United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1250

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

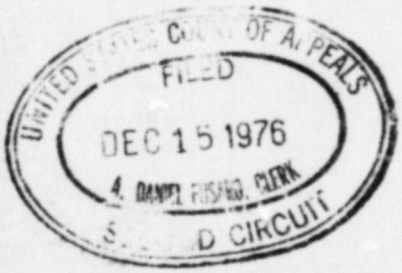
vs.

JOSEPH C. VISPI,

Defendant-Appellant.

On Appeal From the Judgment of the
United States District Court
for the Western District of New York

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING *EN BANC*



RICHARD J. ARCARA
United States Attorney for the
Western District of New York
Attorney for Plaintiff-Appellee
233 U.S. Courthouse
Rochester, New York 14614
Telephone: FTS 473-6760

EUGENE WELCH
Assistant United States Attorney
of Counsel

Daily Record Corporation
Rochester, New York

(2490)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOSEPH C. VISPI,

Defendant-Appellant.

On Appeal From the Judgment of the United States District Court for the Western District of New York

---

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING *EN BANC*

To the Honorable United States Court of Appeals for the Second Circuit and the Honorable Robert P. Anderson, Walter R. Mansfield and William H. Mulligan, Circuit Judges thereof:

The United States of America, plaintiff-appellee herein, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, respectfully petitions this Court for a rehearing of the above entitled case and respectfully suggests the appropriateness of rehearing *en banc*.

The decision complained of herein was a reversal of the conviction of Joseph Vispi for failure to file tax returns with

instructions to dismiss on the grounds that the defendant was denied his Sixth Amendment right to a speedy trial.

The United States of America, plaintiff-appellee (hereinafter the government) respectfully submits that this case should be reheard *en banc* because the case involves questions of exceptional importance. As dissenting Judge Mulligan points out, the panel's majority decision is the only "decision in this Circuit which concludes that although there was no violation of the time limitations provided by a district court's Plan for the Prompt Disposition of Criminal Cases, there was nonetheless a delay so egregious that the defendant's Six Amendment Constitutional right to a speedy trial was violated." (Slip Opinion p. 524)

In addition, the majority opinion herein applies the standards set by the Supreme Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972) in such a way as to eliminate two of the four factors set forth; the reason for the delay and prejudice to the defendant.

Another question of exceptional importance raised by this case concerns what is the government's obligation once it has filed its Notice of Readiness and has made motions to the district court on two separate occasions to fix a date for trial. The majority opinion imposes an intolerable burden on the government to do more and implies the prosecution should actually intrude on the province of the Court by, in effect, running the Court's calendar.

Finally, it is respectfully submitted the majority opinion apparently overlooked and misapprehended critical portions of the record, that is that the government did not merely rely on its Notice of Readiness but instead did press the Court for trial by filing motions for trial on two additional occasions. Also, as the dissent of Judge Mulligan points out, there was nothing in the record showing prejudice to the defendant. Rather, the record demonstrates the defendant was not prejudiced.

ARGUMENT

The majority opinion herein specifically found no violation of the Western District's Plan for the Prompt Disposition of Criminal Cases and yet, even though the government did not seek to delay this trial but rather moved it for trial two additional times after filing its Notice of Readiness, the majority opinion found a violation of the defendant's Sixth Amendment right to a speedy trial. The majority opinion purports to apply the standards of *Barker* v. *Wingo*, 407 U.S. 514 (1972) which establishes a balancing test "in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. at 530.

The defendant herein never moved for trial but rather asserted his right in closing remarks in letters to the Court such as, "As soon as these matters are resolved and the calendar of the court permits, the defendant wishes to have this case set for trial." (App. p. 31) The government on the other hand had filed its Notice of Readiness and then on April 30, 1975 took affirmative action and moved the Court for a trial date (App. p. 19, 20). The defendant then answered the government's motion for trial with its motion to dismiss for lack of speedy trial. (App. p. 21) (In support of his motion defense counsel submitted a letter to the Court and stated the defendant consents to any delay required for the disposition of his motion. App. p. 35) While these motions were still pending the government pressed again for trial with the appropriate motion filed September 23, 1975 (App. p. 36) which motion resulted in the ultimate trial date. On balance therefore the government did precisely what the majority opinion said it should. If the majority opinion requires more, the government would be required to intrude on the court's province and run its calendar. This would be an intolerable burden on the government and an improper usurpation of the court's authority.

The majority opinion also eliminate or distorts two of the four factors enumerated in *Barker*, reasons for the delay and

prejudice to the defendant. Unlike *Barker* where the government caused the delays for tactical advantage by seeking 16 continuances, the government here has sought no continuances but pressed the court for trial. The delays in this case, as dissenting Judge Mulligan points out, were neutral, institutional delays and not deliberate. Yet the Supreme Court affirmed Barker's murder conviction and the majority opinion here reversed Vispi's misdemeanor conviction. By holding that since this was a simple misdemeanor case there was no good reason for the delay, the majority is suggesting that simpler cases should take calendar preferences over the more complicated cases. This is obviously not the intent of the Sixth Amendment.

As for prejudice to the defendant, the majority opinion either overlooked much of the record or chose to eliminate this factor. Judge Mulligan's dissent puts it another way, "the majority overstates the factor of prejudice to Vispi," and Judge Mulligan finds no support in the record for many of the claimed harms to Vispi (Slip Opinion p. 525). While admitting "specific handicaps . . . are difficult to pinpoint" the majority opinion purports to find some anyway without any support in the record.

The majority finds that the pending charges took their toll on Vispi's morale and reputation. Yet the record clearly shows that his morale was down as the result of his being forced out of a law office because his work habits were extremely slow. Also, four character witnesses testified that his reputation was very good even to that day of trial, in spite of the pending charges. (App. pp. 113, 308, 344, 345)

The majority finds that the delay prevented Vispi from finding records he needed for his defense and dimmed recollections. As Judge Mulligan's dissent points out this again ignores the record that by the end of the IRS investigation and long before the charges were filed Vispi knew what the proposed charges were, that the issue was willfulness and at that time Vispi

was represented by a sophisticated New York City law firm which specialized in criminal tax matters (Slip Opinion p. 525). There is no support in the record that any delay hampered Vispi's preparation of this defense. As Judge Mulligan's dissent puts it, it is unrealistic to believe that Vispi's counsel was not prepared to defend this case long before any delay occurred. The majority opinion assumes that Vispi and his counsel did nothing to defend these charges or seek record and witnesses until after the trial began, when in fact the record shows they did all those things prior to any delay. The Supplemental Appendix shows the efforts to which Vispi and his counsel went prior to the filing of the charges in order to convince the government not to prosecute Vispi.

Judge Mulligan's dissent also points out that although Vispi claims his income for 1970 and 1971 was less than that for 1967 and 1968, the charges here were not filed until 1974 and could hardly be considered as the cause of a diminution of income in prior years. Also nowhere in the record is there any evidence of Vispi's income for 1970 and 1971. But assuming that it did decline, it can not be blamed on charges that were not yet filed. Vispi's witnesses all testified that his work habits were so poor that he was forced out of one office and clients were constantly complaining. This was the obvious cause of his declining income and not the long pendency of charges which hadn't yet been filed.

The majority overlooked the fact that Vispi's prosecution was transferred from Buffalo where he lived and worked to Rochester, New York and thereby the public scorn from the pending charges was reduced.

The majority opinion concluded that the 20 month delay in bringing this case to trial is sufficient to trigger the *Barker* v. *Wingo* inquiry because of all the circumstances, even though 20 months is not *per se* excessive. The circumstances that caused this conclusion were the pre-information delay and the post-trial

delay before the Court entered its finding of guilt. But the majority and dissent both find that the pre-information delay was to the benefit of the defendant who was attempting to dissuade the government from criminal prosecution.

It is respectfully submitted that the majority opinion also misapprehends the record as to the post-trial delay. The majority finds that Judge Burke, the trial Judge, had the decision under advisement for almost six months. But in fact Judge Burke had the matter under advisement for a little over one month. Defendant submitted his proposed findings on March 12, 1976 and Judge Burke ruled April 20, 1976 (App. p. 356, 358).

In *Barker* v. *Wingo*, 407 U.S. 514 (1972) the Supreme Court held that the murder conviction of Barker was not in violation of his Sixth Amendment rights in circumstances much worse than in this case. Applying the Supreme Court's guidelines to the record here, it is respectfully submitted the case should be reheard.

In regard to the conduct of the defense and prosecution, in *Barker* the prosecution deliberately caused delays for tactical advantage sixteen times and the defendant, although not very strongly, did object once and moved for dismissal. The Supreme Court still affirmed. In *Vispi* the government and defense both pressed for trial, the government by motions and the defense by letter and one motion to dismiss. The majority reversed.

In *Barker* the delay of a murder trial was 62 months, in *Vispi*, a misdemeanor tax charge, the delay was 20 months. Yet the Supreme Court affirmed *Barker* and the majority here reversed.

In *Barker* the reason for the delay was the government's deliberate efforts to delay. In *Vispi* the reason was solely institutional. Yet the Supreme Court affirmed *Barker* and the majority here reversed *Vispi*.

In *Barker* the Supreme Court discounts as minimal the prejudice to the defendant of being in jail for ten months and having murder charges pending against him for sixty-two months. Yet here where Vispi was never jailed the majority finds enough prejudice to reverse simply because misdemeanor charges were pending for twenty months. There's no other prejudice shown in the record. Rather the record shows there was no prejudice to the defendant.

CONCLUSION

It is respectfully submitted that the majority opinion herein raises questions of exceptional importance and upon the arguments set forth above the government respectfully petitions this Court to rehear this case *en banc*.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney for the
Western District of New York
Attorney for Plaintiff-Appellee
233 U.S. Courthouse
Rochester, New York 14614
Telephone: FTS 473-6760

EUGENE WELCH
Assistant United States Attorney
of Counsel

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

11 Centre Park
Rochester, New York 14608
Correspondence: P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

December 13, 1976

Re: UNITED STATES OF AMERICA V VISPI

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

RICHARD J. ARCARA, U.S. ATTORNEY FOR THE WESTERN DISTRICT OF N.Y.
BY MR. EUGENE WELCH, ASST. U.S. ATTORNEY

Attorney(s) for
PLAINTIFF-APPELLEE
On December 13, 1976

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

OHLIN, DAVMON, MOREY, SAWYER & MOOT
1800 Liberty Bank Bldg.
Buffalo, NY 14202
ATTN: RICHARD E.MOOT,ESQ.
TERRENCE M. CONNORS, ESQ.

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

.....John D. Hay.....

Sworn to before me this 13th day of December 1976

.....Lester A. Fanning.....

Notary Public
~~Commissioner of Deeds~~

LESTER A. FANNING
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978